No. 05-737 SEP 6 2005

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IN THE

Supreme Court of the United States

LARRY KEY,

Petitioner

v.

DIRECTV, INC.,

Respondent

On Petition for Writ Of Certiorari
To The U.S. Court of Appeals, 4th Circuit

PETITION FOR WRIT OF CERTIORARI

LARRY KEY, PETITIONER
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QUESTIONS PRESENTED FOR REVIEW

I. Whether a non-prevailing party to an action can receive discovery sanctions when any delay, if any, in providing the discovery responses, did not result in the non-prevailing party's desire to voluntarily dismiss this lawsuit.

II. Whether the trial judge erred in failing to apply the four-part test for a district court to use when determining what sanctions to impose under Federal Rule of Civil Procedure 37.

RULE 14.1(b) LISTING

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PETITION FOR WRIT OF CERTIORARI

Curtis T. Brown respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals, 4th Circuit, in this case.

OPINIONS AND ORDER BELOW

The opinions of the U.S. Court of Appeals, 4th Circuit, and the opinions of the U.S. District Court for Eastern District of Virginia.

JURISDICTION

The U.S. Court of Appeals, 4th Circuit, entered its judgment on June 8, 2005. Therefore, the Petitioner timely filed a petition for review within ninety days of that date as provided by Supreme Court Rule 13.3. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In the pertinent part, the Fourteenth Amendment to the United States Constitution provides: [No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.]

This case also involves the attorney being denied his due process right to an impartial fact-finder when he was subjected to the Trial Court which functioned as fact-finder in quasi-judicial

proceeding involvi[illegible]sts which were substantial and recoverable by a non-prevailing [illegible]y for filing frivolous lawsuit.

STATEMENT OF THE CASE

DirecTV (hereinafter referred to as the "Respondent") filed its complaint against Larry Key on April 7, 2003 in the U.S. District Court for the Eastern District of Virginia, Richmond Division. Larry Key (hereinafter referred to as the "Petitioner") filed his answer and Motion to Dismiss pursuant to Rule 12(b)(6) on May 5, 2003. On August 6, 2003, by court order, Count III of the Complaint was dismissed. On October 17, 2003, by court order, sanctions of nearly $10,000.00 were imposed upon Counsel for the Petitioner for failure to file a response to the motion to compel, failure to appear for oral argument on the motion to compel, and failure to submit a brief in support of the motion to vacate as required by the Local Rules. On December 31, 2003, by court order, the action was dismissed with prejudice; however, the Court's Order of October 17, 2003 imposing sanctions against Counsel for the Petitioner remains in effect and was hereby incorporated by reference. The court order of January 30, 2004, denied the Respondent's motion to vacate the judgment. The Petitioner filed his appeal to the U.S. Court of Appeals, 4th Circuit, on March 1, 2004, and filed his brief to the U.S. Court of Appeals, 4th Circuit, which was denied without affording the Petitioner oral argument, on June 8, 2005.

REASONS FOR GRANTING THE WRIT

This case is timely and deserves consideration regarding a very fundamental right of which our Constitution is based. Namely, the due process right to be heard which embodies a right to examine testimony confront, cross-examine, and a right to know the identity of witnesses, or present witnesses, or evidence of his own.

The attorney was denied his due process right to an impartial fact-finder when he was subjected to pay costs of proceedings, which

were substantial and recoverable by a non-prevailing party's desire to voluntarily dismiss their frivolous case.

THE COURT SHOULD GRANT THIS WRIT BECAUSE THE DECISION OF THE U.S. COURT OF APPEALS, 4TH CIRCUIT, IS ERRONEOUS AS IT IS BASED ON A NON-PREVAILING PARTY TO AN ACTION RECEIVING DISCOVERY SANCTIONS WHEN ANY DELAY, IF ANY, IN PROVIDING THE DISCOVERY RESPONSES, DID NOT RESULT IN THE NON-PREVAILING PARTY'S DESIRE TO VOLUNTARILY DISMISS THIS LAWSUIT.

No sanctions should have been imposed because the purpose of discovery rule is to produce evidence for speedy determination of trial and not to punish erring parties. Robinson v. Transamerica Ins. Co., 368 F 2d 37 (1966).

Rule 37(a) is not a prerequisite to imposition of sanctions under Rule 37(a) and sanctions are only proper where there has been complete or nearly total failure of discovery. Fox v. Studebaker Wothrington, Inc. 519 F.2d 989, 992, (1975).

Respondent had determined on September 25, 2003, that most of the Petitioner's discovery requests were answered satisfactorily. In Robinson v. Transamerica Ins. Co., 368 F.2d 37 (1966), the Court ruled that the purpose of discovery rules is to produce evidence for speedy determination of trial and not to punish erring parties. Additionally, on September 30, 2003, the Petitioner faxed the Respondent everything requested regarding all discovery requests. The Magistrate Judge incorrectly stated that the Plaintiff's second Motion to Compel be granted because the discovery requests were already made at the time. The prejudice, if any, was by the Magistrate Judge Lowe against Counsel for the Petitioner for refusing to compromise the Petitioner's rights by settling this frivolous lawsuit.

In the Memorandum Opinion letter of October 17, 2003, regarding the sanctions order of nearly $10,000.00 imposed upon Counsel for the Petitioner, Magistrate Judge Lowe stated:

..."Mr. Brown's egregious conduct in the case at bar has seriously jeopardized whatever defenses his client may have had. If Defendant wishes to submit a Motion to Substitute Counsel, or even to proceed pro se, the Court will give it due consideration" (App. Infra 8).

On October 29, 2003, Counsel for the Respondent deposed the Petitioner, and on November 19, 2003, Counsel for the Respondent moved to voluntarily dismiss this lawsuit and requested Magistrate Judge Lowe to incorporate the sanctions against Counsel for the Petitioner. Respondent, after taking the Petitioner's disposition, decided that it no longer wished to proceed with its claim against the Petitioner. The only prejudice that is suggested, if any, by the approximate month delay in the discovery responses is that the Respondent couldn't do the deposition of the Petitioner sooner than October 2003. However, the Respondent waited an additional month to voluntarily dismiss on November 19, 2003. Moreover, on December 30, 2003, Counsel for Respondent contacted Magistrate Judge Lowe's law clerk with a clerical question regarding the Court's scheduling order. Counsel for Respondent was asked whether the Respondent intended to dismiss its claim against the Petitioner with or without prejudice. Counsel for Respondent responded that DirecTV had intended to dismiss its claim with prejudice. Clearly, this is ex-parte communications as Counsel for the Petitioner was not informed of this conversation until the Counsel for the Respondent filed its Motion in Opposition of the Petitioner's Motion to set aside the judgment.

THE COURT SHOULD GRANT THE WRIT BECAUSE THE TRIAL JUDGE ERRED IN FAILING TO APPLY THE FOUR-PART TEST FOR A DISTRICT COURT TO USE WHEN DETERMINING WHAT SANCTIONS TO IMPOSE UNDER FEDERAL RULE OF CIVIL PROC-EDURE 37.

Rule 37 by its terms limits assessment hereunder to fees and expenses flowing from abuse of discovery process and no

assessment may be made for expenses which were incurred independent of that process. Stillman v. Edmund Scientific Co., 522 F. 2d 798 (1975).

Counsel for the Respondent further, under oath misresprented to the trial court that he sent a letter, on August 6, 2003 for the Petitioner stating, "The letter also stated that we would be glad to remove the hearing from the docket is discovery is responded to in a timely manner." The truth of the matter is, the letter of August 6, 2003 states, "...If your client fully responds to every discovery request before the hearing on the motion to compel, DirecTV will remove the hearing from the Court's docket." Further, Counsel for the Respondent's letter of August 8, 2003 stated, "It is my sincere hope that your client will fully respond to DirecTV's discovery request before the August 21st hearing. If your client does fully respond before August 21st hearing, I will have the hearing, I will have the hearing removed from the Court's docket...."

The trial judge did not consider the four-part test as required in determining what sanctions to impose under the Rule. Specifically, the trial judge never considered the amount of prejudice that non-compliance caused the adversary and stated, "It is clear to the Court that Mr. Brown acted in bad faith and prejudiced Plaintiff when he failed to respond to Plaintiff's discovery requests, telephone calls, and letters; failed to appear for the August 21st hearing; failed to produce his secretary for examination on October 1st; and made under Federal Rule of Civil Procedure 37." Moreover, the record fails to disclose, any previous delays or late filings of documentation in this case.

Therefore, the trial Judge erred in failing to apply the four-part test for a district court to use when determining what sanctions to impose under Federal Rule of Civil Procedure 37.

CONCLUSION

The Petition Writ of Writ Certiorari should be granted.

Respectfully Submitted.

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